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In The
Supreme Court of the United States
October Term, 1986

GOLETA WATER DISTRICT, *et al.*,
Petitioners,

v.

A. FRANK McMILLAN and
GLADYS BOTTROFF McMILLAN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

Respondents, A. Frank McMillan and Gladys Bottroff McMillan, owned a residence supplied with domestic water by the Goleta Water District. In 1967 after the McMillans had demolished the existing residence to prepare for construction of new units on the property, the district turned off the water but left all service facilities, including the

meter in place. The record of this case does not reveal why the water was turned off or who requested that action. Petition Appendix (Pet. App.) C2. The McMillans did not proceed immediately with the construction of the new units and the lot remains vacant today.

In December, 1972, the water district enacted Ordinance No. 72-2 which imposed a moratorium on "new, additional, further, expanded or increase-in-size water service connections." Pet. App. F1. The ordinance also prohibited the provision of water "through any existing, installed water service facilities which were not used for furnishing any significant quantity of water for any bonafide [*sic*] purpose at any time within five years prior to December 7, 1972." Pet. App. F6. It was recognized by the courts below that this prohibition on water " 'through any existing, installed water service facilities' " applied to the McMillans, who were not covered by the prohibition on "new water connections." Pet. App. A2-3. Ordinance No. 72-2 allowed the board of directors of the water district to continue "in its discretion" to grant water service connections either on an appeal of a staff denial or as an exception to the moratorium. Pet. App. F8.

In May, 1973,[1] the water district adopted "The Responsible Water Policy Ordinance" (Policy Ordinance) which also prohibited "new or additional service connections" under certain specific conditions. Pet. App. G4. On September 15, 1982, the McMillans applied to have the water turned back on using a form provided by the water

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[1] The reference by the Court of Appeals to 1983 as the date of this ordinance (792 F.2d at 1455, Pet. App. A3) is an error.

district entitled: "APPLICATION FOR EXCEPTION TO ORDINANCE 72-2." Pet. App. A3. The water district charged the McMillans a $200 fee to accept and process this application. The board of directors conducted a hearing and denied the request for exception. *Id.* The McMillans requested reconsideration. The water district's general manager requested and received additional information from the McMillans and then denied reconsideration on November 12, 1982. This case was filed May 2, 1983. *Id.*

The McMillans could not afford counsel and proceeded as pro se litigants. Pet. App. D1. The District Court summarily dismissed their complaint. Pet. App. E1, but the McMillans, still proceeding pro se, obtained a reversal from the United States Court of Appeals for the Ninth Circuit allowing them leave to amend their complaint. Pet. App. B1-4. After the filing of the amended complaint, the District Court granted summary judgment to the water district on two claims and dismissed the third. Summary judgment was granted on the inverse condemnation claim on the basis that it was time barred because "[a]s early as 1973 or 1974 plaintiffs knew or should have known that their rights to continued water service had been interrupted by the District on other than a temporary basis." Pet. App. C10. The District Court dismissed the federal substantive due process claim on the basis that the court lacked "subject-matter jurisdiction" because a state court had already ruled that no damages could be recovered on such a claim under California state law and that the proper remedy was a proceeding in mandamus which would be

"inappropriate for this court to take up." Pet. App. C14-16. Summary judgment was granted on the equal protection claim because the court concluded that the McMillans in their opposition to the summary judgment motion had "not presented any evidence that their treatment by the District was motivated by anything other than a rational interest in upholding the moratorium." Pet. App. C17.

The Court of Appeals affirmed the summary judgment on the equal protection claim, reversed on the other two claims, and remanded the case to the trial court for further proceedings. Pet. App. A13. On appeal the water district had raised the question of abstention. Although a brief mention of abstention appeared in the water district's summary judgment papers, no motion to abstain was ever submitted for consideration by the District Court. The Court of Appeals rejected the water district's request that the appellate court direct the District Court to abstain. The Court of Appeals left the question of abstention to the trial court's discretion on remand. Pet. App. A10-13.

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SUMMARY OF ARGUMENT

The petition raises no important question of federal law which has not been decided by this Court or which conflicts with applicable decisions of this Court. Since the Court of Appeals remanded the case to the District Court there is no final judgment against the petitioner water district for this Court to review. The questions of federal law raised in the petition are either open for decision by the District Court on remand or raise factual

issues which have not been decided by the courts below and will be considered by the District Court on remand.

ARGUMENT

I

THE DECISION OF THE COURT OF APPEALS IS NOT RIPE FOR REVIEW BY THIS COURT

In the Court of Appeals this case was "REMANDED for further proceedings consistent with this opinion." Pet. App. A13. Therefore, no final judgment has been entered against the water district.

> "Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967).

The District Court ruled on three separate claims, granting summary judgment for defendant water district on plaintiffs' claims for inverse condemnation and violation of their rights to equal protection and dismissing plaintiffs' claim for violation of their rights to substantive due process. Pet. App. C1, C17. The Court of Appeals affirmed the summary judgment for the water district on the equal protection claim and reversed on the substantive due process and taking claims. Pet. App. A13. Therefore, the only portion of the opinion of the Court of Appeals which even rises to the level of possible law of the case is the ruling in favor of the water district on the equal

protection claim. No challenge to this ruling is raised by the petition. On the claims which are the subject of the petition, the water district is merely objecting to the prospect of going to trial.

> "As has been many times declared, this [certiorari] is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. And, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) (citations omitted).

This is not an extraordinary case.

Exercising certiorari jurisdiction at this point in this case would be inconsistent with "the long-established policy against piecemeal appeals." *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978). The effect of the opinion of the Court of Appeals is to put the water district into a status in this litigation no different from any litigant who has had a motion for summary judgment denied. The denial of a summary judgment is not even an appealable order. It "does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing—that the case should go to trial." *Switzerland Cheese Association v. Horne's Market*, 385 U.S. 23, 25 (1966).

In its "point two" in the petition, the water district merely quibbles with the Ninth Circuit's interpretation of the District Court's ruling on a factual determination. This Court is requested to intercede to provide guidance as to what the District Court meant when it used the

phrase, "identical constitutional challenge." Pet. 19; Pet. App. C14. Obviously this question is easily resolved by the District Court itself on remand.

In its "point three" the water district appears to be asking this Court to determine that the District Court had in fact abstained from the exercise of jurisdiction. Obviously a court which grants summary judgment on two claims and dismisses a third has not abstained from the exercise of its jurisdiction. In reviewing the abstention question the Court of Appeals applied the abuse of discretion standard. Pet. App. A13. The decisions of this Court have clearly indicated that this is the appropriate standard for reviewing a trial court decision not to abstain. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984). Since the Court of Appeals applied the correct standard of review, whether or not it reached the most appropriate result, the issue does not merit review by this Court at this time. The water district is free to argue again to the District Court that it should abstain. Only the water district's "point one" merits further discussion.

II

FACTUAL MATTERS LEFT UNDECIDED BY THE COURTS BELOW CONTROL THE QUESTION PRESENTED ON THE APPLICATION OF THIS COURT'S DECISION IN WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION v. HAMILTON BANK OF JOHNSON CITY

The only contention raised in the petition which is related to an important question of federal law is the argument that the Court of Appeals did not properly apply this Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. —, 105 S. Ct. 3108 (1985). The question presented

is based on the assertion that "the facts [of this case] make the request for a final decision futile because the outcome is definite and cetain [*sic*] against the applicant." Pet. i. Essentially the water district asserts that after adoption of the Policy Ordinance in 1973, it "had no option to give any variance or to grant any request." Pet. 14. This statement cannot be reconciled with the facts. Long after the Policy Ordinance was adopted, the district routinely provided applicants with a standard form on which to request an exception to the moratorium. These exception applications were accepted by the water district and processed through a hearing before the board of directors. The district even charged and accepted a $200 fee to consider an application. The board of directors purported to act on each exception application under the exception provision of Section 13(b) of Ordinance No. 72-2. Pet. App. F8-9. The McMillans are only one of many who went through this process before the water district. In a document filed by the McMillans in the District Court the water district stated:

> "The number of new meters installed since 1972 (1973 through 1982) is 504. The number of new meters installed under exception procedures (included in above number) since 1972 is 35." Exhibit No. 13 to Plaintiffs Opposition to Motion for Summary Judgment at 6; Excerpt of Record in Court of Appeals, Tab 31, Exhibit No. 13 at 6.

Moreover, in the current status of the case the factual question of whether the Policy Ordinance would apply to the McMillans has not been resolved. The Court of Appeals recognized that the key factual question of " 'whether [the McMillans] were actual (or "constructive") users and not merely potential users' " had not been resolved.

Pet. App. A6-7. "Yet here the district court did not determine whether the McMillans were actual water users, as they contended, or whether they were merely potential users." Pet. App. A9. The Policy Ordinance which the water district now claims left it "no option to give any variance or to grant any request," Pet. 14, by its terms only applies to "applications for new or additional service connections." Pet. App. G4. If the McMillans are found on the facts of this case to be actual users with an existing service connection the ordinance will not apply.

There is a substantial possibility that the McMillans will prevail on this point in the trial court. It is not disputed that the McMillans' property had been receiving water from the district and that the water service connection from the water main to the property including an operable water meter was in place. Pet. 5. The water was turned off only because McMillans started a project to rebuild the residential structures on the lot. *Id.* Not until 1983 after the McMillans' application to turn on the water had been denied did the district remove the water meter and take the McMillans off of "active status" on the district's books. *Id.* On these facts, neither of the two ordinances necessarily precludes turning on the McMillans' water.

Ordinance No. 72-2 contains two separate provisions which give the board of directors discretion to approve water service in spite of any prohibitions in that ordinance. Section 13(a) allows the board "in its discretion" to reverse any decision by the staff not to allow water. Section 13(b) allows the board "in its discretion" to grant exceptions to the ordinance for various reasons, including

"undue hardship" and no adverse effect on other water consumers. Pet. App. F8. The McMillans could qualify under either provision.

The Policy Ordinance does not say that it rescinds or supersedes Ordinance No. 72-2. By its terms it applies only to "new or additional service connections." Pet. App. G4. The McMillans, however, had a service connection. It just wasn't turned on. The Court of Appeals recognized that the water district itself considered the McMillans to have an existing water service. The water district applied to them Section 9 of Ordinance No. 72-2 which applies only to "existing inactive facilities." Pet. App. A2-3, F6. The McMillans' application to restore water service was submitted on the standard form provided by the district entitled: "APPLICATION FOR EXCEPTION TO ORDINANCE 72-2." The application was processed and denied on the basis of Ordinance No. 72-2. When the water district accepted the McMillans' application and charged them a $200 application fee, it was not suggested that the application was "futile" and a total waste of their time and money because the Policy Ordinance prohibited any water service. If the water district itself believed that it had power to grant exceptions under Ordinance No. 72-2 it can hardly be fairly said that the McMillans should have known that such an application would be futile.

The district's belated legal argument is that the effect of the adoption of the Policy Ordinance was to create an immediate cause of action in the McMillans and the other "thousands of people in the Goleta Water District who want water but cannot get it." Pet. 13. Whether or not

this legal argument has merit, it cannot be addressed until it is determined from the facts of the case whether the McMillans' application requested "new or additional service connections." Pet. App. G4. Until the factual questions are resolved by the courts below, the question presented in the petition concerning the proper application of this Court's decision in *Williamson County* is not ripe for review.

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CONCLUSION

The petition for writ of certiorari should be denied.

DATED: January, 1987.

Respectfully submitted,

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